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No. 79-1930

# In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS J. ALBERNAZ, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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### QUESTION PRESENTED

Whether there were prejudicial errors in the trial court's jury instructions with respect to the definition of "distribution," petitioners' entrapment defense, or the explanation of "reasonable doubt."

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 585 F. 2d 1234.

## JURISDICTION

The judgment of the court of appeals was entered on February 27, 1980. A petition for rehearing was denied on May 8, 1980 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on June 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to import marijuana (count 1) and conspiracy to distribute marijuana (count 2), in violation of 21 U.S.C. 963 and 846. Petitioner Rodriguez was sentenced to consecutive terms of four and one-half years' imprisonment on each count, to be followed by consecutive two-year special parole terms. Petitioner Albernaz was sentenced to consecutive terms of three and one-half years' imprisonment on each count, to be followed by consecutive two-year special parole terms. Petitioner Smigowski was sentenced to consecutive terms of three years' imprisonment, to be followed by consecutive two-year special parole terms. Petitioner Martins was sentenced to concurrent terms of three years' imprisonment and a two-year special parole term.[1] A

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[1]None of the petitioners challenges the propriety of imposing a special parole term as part of his sentence for the narcotics conspiracy offenses. In *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this Court held that a special parole term may not be imposed upon a defendant convicted of narcotics conspiracy. In light of the decision in *Bifulco*, petitioners may wish to move the district court for correction of their sentences under Rule 35, Fed. R. Crim. P.

panel of the court of appeals affirmed all of the convictions on the importation conspiracy count and the convictions of Rodriguez and Albernaz on the count charging conspiracy to distribute marijuana. The convictions of Smigowski and Martins on the charge of conspiracy to distribute marijuana were reversed (Pet. App. 1a-21a, 585 F. 2d 1234).[2] On rehearing en banc, limited to the issue of cumulative punishment for conviction on the two conspiracy counts, the consecutive sentences of Rodriguez and Albernaz were affirmed (612 F. 2d 906). The en banc court remanded the case to the original panel for consideration of other issues, applicable to all four petitioners, raised in a petition for rehearing (Pet. App. 27a-28a). The panel denied rehearing (Pet. App. 29a-30a).

This is the second petition for certiorari filed by petitioners Albernaz and Rodriguez. The first petition, No. 79-1709, is directed to the issue decided by the en banc court, and the instant petition is directed to issues considered by the panel. The pertinent evidence has been set forth in the first opinion of the panel (Pet. App. 5a-7a) and in our brief opposing certiorari in No. 79-1709.

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[2]The panel concluded (Pet. App. 16a-17a) that the evidence was insufficient to show their involvement in a conspiracy to distribute the marijuana once it reached the United States. The panel found sufficient evidence, however, that petitioners Albernaz and Rodriguez had arranged to transport and distribute the marijuana in this country (Pet. App. 15a-16a).

The 13 members of the freighter's crew were charged as co-conspirators, tried separately, and convicted. On appeal, the same panel that decided petitioners' appeal affirmed the crew members' convictions for conspiracy to import marijuana, while reversing a conviction for conspiracy to distribute as to the one individual among the 13 whose sentence on the two counts had not been ordered to run concurrently. *United States* v. *Cadena*, 585 F. 2d 1252, 1266 (5th Cir. 1978).

## ARGUMENT

Petitioners assert that the district court committed reversible error in its charge to the jury by improperly defining the term "distribution" (Pet. 8-9), by allegedly failing to give adequate instructions on their entrapment defense (Pet. 10-12), and by equating "reasonable doubt" with "substantial doubt" (Pet. 12-14). As explained below, we do not believe any of these claims justify reversal of the convictions. Moreover, particulars of the relevant language of the charge are not likely to occur in other cases; accordingly this case lacks general significance and does not warrant review by this Court.

1. Petitioners Albernaz and Rodriguez assert (Pet. 8) that the court's instruction on distribution was likely to mislead the jury into believing that it could convict them of conspiracy to distribute if it found them guilty of conspiracy to import. In defining distribution, the district court stated (Tr. 751): "Distribution means, with respect to any article, transferring into the United States some or all of that article to another individual while within the United States." The court of appeals characterized the reference to "transferring into the United States" as "erroneous" (Pet. App. 15a), and certainly the instruction is, at best, inartfully worded, since it literally requires the distributor to be simultaneously outside and within the United States. Because petitioners did not object to the charge, however, relief is precluded in the absence of plain error. Fed. R. Crim. P. 30, 52(b).[3] Here, the court of

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[3]As the court of appeals pointed out (Pet. App. 15a), it was the prosecutor, not petitioners, who pointed out the possible problem in the instruction before the charge was given; and it was the court's inadvertent failure to follow the prosecutor's suggested substitute language that provides this point on appeal.

appeals correctly held (Pet. App. 15a) that reversal on this point was not appropriate because the error was not prejudicial as to these two petitioners.

First, as the court observed (Pet. App. 15a), "in other parts of the instruction, the [trial] court correctly stated the law." Thus, the court twice described count 2 (Tr. 749, 750) as alleging that petitioners conspired "to distribute" marijuana or a controlled substance "in the United States while within the United States." Moreover, the court carefully defined "importation * * * with respect to any article" (Tr. 751) as "a bringing in or introduction of such article into an area" and restated at this point that petitioners were charged in count 1 with conspiring to "import a controlled substance into the United States from a place outside of the United States." Given the context of the distribution definition, the commonly understood meaning of the word "distribute," and the strong evidence of a conspiracy to distribute that was distinct from the conspiracy to import,[4] petitioners are simply incorrect in their contention (Pet. 8) that the instruction "obliterated the distinction between the two counts of the indictment" and thereby led the jury to convict them of an importation conspiracy on both counts.[5] Thus the court of appeals correctly held that any

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[4]As the court of appeals noted (Pet. App. 15a, 16a), "[t]here was mention of the use of Winnebagos to transport the marijuana, * * * Rodriguez indicated that his group was short on 'front money,' " and the evidence indicated that both these petitioners "had contacts outside the Miami area."

[5]*Yates* v. *United States*, 354 U.S. 298 (1957), and *Bachellar* v. *Maryland*, 397 U.S. 564 (1970), which petitioners Albernaz and Rodriguez cite (Pet. 9) for the proposition that reversal is required where the instructions are such that a guilty verdict could well have rested on an impermissible ground, are therefore inapposite. Here the court of appeals, examining the instructions on conspiracy to distribute in order to determine whether any error "might have contributed to the verdict that was reached" (Pet. App. 15a), concluded in effect that the error could not have contributed to the convictions of petitioners Albernaz and Rodriguez.

error in the trial court's definition of the term "distribution" was clearly harmless.

2. Petitioners contend (Pet. 10-12) that the trial court failed to give adequate instructions respecting their defense of "jurisdictional entrapment." The theory of this defense was that government agents had induced them to import marijuana into this country, as opposed to some other country, and that therefore, even assuming petitioners were predisposed to import marijuana elsewhere, the agents' conduct constituted entrapment with regard to the offense of conspiring to import into the United States. We doubt that petitioners were entitled to an instruction on this theory, since they did not properly raise the defense in the course of the trial. In any event, there is no error here because the court's charge adequately placed this entrapment defense before the jury.

The claim of jurisdictional entrapment was not founded upon any testimony given by petitioners or their co-defendants, none of whom took the stand. Rather, petitioners relied primarily upon the testimony of Nino Rinsi Cadena, the Colombian captain of the freighter that was the source for the marijuana. According to Cadena, the individuals who had hired him in Colombia stated that the cargo was destined for the Bahamas or Canada and was not intended to go to the United States (Tr. 584-585). Cadena denied knowing petitioners (Tr. 588-589).

In our view, the fact that the captain of a freighter containing a cargo of thousands of pounds of marijuana (see *United States* v. *Cadena*, 585 F. 2d 1252, 1256 (5th Cir. 1978)) may have been kept in the dark regarding the identities of the intended recipients and was told that the marijuana was not destined for this country, did not confer upon petitioners the right to claim entrapment based upon a theory that they intended to import their share of the illicit cargo into some other country. Nor was a basis established by the fact, now relied on by

petitioners (Pet. 6), that the persons whom they recruited to offload the marijuana from the freighter (at a point identified in instructions from petitioner Albernaz) were all government agents. Because petitioners did not provide an adequate foundation for their entrapment defense, they were not entitled to have the jury consider their theory. See *United States* v. *Heathington*, 545 F. 2d 972 (5th Cir. 1977); *United States* v. *Linn*, 438 F. 2d 456, 460 (10th Cir. 1971).

Even assuming that petitioners were entitled to an entrapment charge, however, there is no ground for reversal because, as the court of appeals concluded (Pet. App. 8a n.6), the instruction given by the trial court adequately presented petitioners' entrapment theory. The trial court stated at the outset (Tr. 757) that "the function of law enforcement is the prevention of crime against the United States and the apprehension of those who commit or conspire to commit crimes prohibited by the laws of the United States." After explaining that law enforcement officials may not manufacture offenses, the court continued (Tr. 757-758):

> It is not unlawful under U.S. law for individuals to willfully conspire to import and/or distribute marijuana into a country other than the United States. In the event the evidence establish[es] that the Government induced the defendants to import and/or distribute marijuana into the United States, as opposed to some other jurisdiction or country, then the defense of entrapment will lie.

Examined in context, the court's charge was sufficient to convey the notion that if petitioners were predisposed to deal in marijuana only in a foreign country and the government induced them to agree to bring the marijuana into the United States, then petitioners would have established an entrapment defense.

3. We recognize that some courts have criticized an instruction equating reasonable doubt with substantial doubt, *United States* v. *Zimeri-Safie*, 585 F. 2d 1318, 1322 (5th Cir. 1978); *United States* v. *Wright*, 542 F. 2d 975, 987-988 (7th Cir. 1976); cert. denied, 429 U.S. 1073 (1977); see *Taylor* v. *Kentucky*, 436 U.S. 478, 488 (1978), and we believe it is preferable not to instruct in such terms. Nevertheless, such an instruction has not been regarded as reversible error if the charge on reasonable doubt, examined in its totality, has fully and properly conveyed the concept of reasonable doubt. *United States* v. *Fallen*, 498 F. 2d 172, 176-177 (8th Cir. 1974). This is simply an application of the rule, followed by this Court, that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973).

The trial court instructed the jury (Tr. 747) that petitioners were clothed with a presumption of innocence and that the presumption remained unless and until the government proved guilt beyond a reasonable doubt. The court then explained reasonable doubt as follows (Tr. 747-748):

> A reasonable doubt means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative. It does not mean a mere possible doubt or a speculative, imaginary or forced doubt. It is the kind of doubt which would cause a reasonable person to hesitate in making a decision or in taking an important step in some serious matter in his own private affairs.
>
> A reasonable doubt exists whenever, after careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral

> certainty that a defendant is guilty of the charge. So, if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilty, the jury should, of course, adopt the conclusion of innocence.

In this case, as in *United States* v. *Fallen, supra*, the charge considered in its totality properly explained reasonable doubt, and the court of appeals—which was itself critical of the reference to "substantial doubt" (Pet. App. 9a-10a)—correctly concluded that the charge did not constitute reversible error.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

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